IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
IN ADMIRALTY

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HAMBURGER VERSICHERUNGS - AG (iGR),

Plaintiff,

Case No.: CV-03-285-KBM/LAM

vs.

THOMAS C. WIMBER and
JOHN L. MUNZENMEIER,

Defendants.
_____ /

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR BIFURCATION AND STAY OF DISCOVERY

COMES NOW the Plaintiff, HAMBURGER VERSICHERUNGS - AG (iGR), by and through its undersigned attorneys, and pursuant to Rule 42(b) of the Federal Rules of Civil Procedure hereby files its Reply Memorandum of Law in support of its Motion for Bifurcation of Trials and a Stay of Discovery, and further thereto would state as follows:

1. Plaintiff's action is a simple one, and the relief sought in the instant motion is intended to allow this litigation to remain simple. The cynical arguments put forward by opposing counsel cannot disguise the manifest fact that Defendant's aim remains to swamp this Court with discovery that is at best premature and at worst intended to so alter the terms and the very subject matter of the litigation as to render it unrecognizable.

2. Plaintiff seeks a declaratory judgment from this federal district court ruling that a contract of marine insurance

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is void because of the Defendant's failure to comply with familiar and well established obligations imposed upon insureds by the federal maritime law of the United States. The facts will demonstrate that Mr. Wimber submitted documentation via his brokers which misstated material facts concerning his vessel's condition. The facts will also demonstrate that Mr. Wimber operated his vessel in breach of express warranties that are universally recognized in the law of marine insurance.

3. However, in a counterclaim alleging bad faith, the Defendant is attempting to shift the focus of the litigation away from his own conduct and the impact of that conduct on the coverage afforded by the Plaintiff's policy of marine insurance. Defendant's counsel, without support, states in her previous pleading that she "believe[s] that the evidence will show that [Plaintiff] has a history of accepting money for insurance and then denying claims on the basis that the ships are unseaworthy."

4. In order to pursue that utterly speculative assertion, Defendant seeks to conduct discovery into issues having absolutely nothing to do with the issues asserted in the Complaint for Declaratory Judgment. In support of the instant motion, the undersigned counsel for the Plaintiff attached the discovery demands which were recently served by Defendant, illustrating that these discovery demands are unconcerned with obtaining evidence bearing on the issue of whether the policy does or does not afford coverage for the incident of December 29, 2003. Rather, virtually the entirety of the Defendant's discovery demands are pitched at

Plaintiff's practices in handling claims; Defendant seeks production of past claims files; Defendant seeks production of such manifestly privileged documents as correspondence between the Plaintiff's managing general agent in the United Kingdom and outside legal counsel in Florida.

5. Defendant's goal is to demonstrate to the Plaintiff that it will be costly in the extreme to pursue the action for declaratory judgment against Mr. Wimber, with costs and expenses far in excess of those which might have been originally calculated in deciding to seek the intervention of this federal court.

6. This is a tactic that is as obvious as it is cynical, and one which federal courts are routinely called upon to deal with as astute counsel searches for methods to complicate simple cases in an effort to avoid expeditious and relatively inexpensive resolution.

7. The method that exists for this Court to avoid the trap which Defendant's counsel has set out is to grant Plaintiff's motion for a bifurcation of the trial and a stay of any discovery on the counterclaim. Plaintiff's Motion for Bifurcation and Stay of Discovery cited this Court to numerous cases which have followed the provisions of Fed. r. Civ. P. 42(b) and in the context of first party insurance coverage litigation have indeed bifurcated the trial and stayed discovery on the counterclaim which invariably asserts blood-curdling and outrageous allegations of bad faith. This permits the underlying, basic and extremely simple coverage action presented in the Complaint for Declaratory

Judgement to proceed untrammeled by the extraneous and secondary issues raised in the counterclaim. It permits the federal district court to resolve the basic issues without having to burden the litigation with accommodating the abusive discovery that must follow from permitting a very unproven bad faith counterclaim to proceed.

8. The Defendant's claim that separate trials will deprive him of a right to a jury trial is utterly without merit, and without support in the caselaw. If such an assertion were true, then the cases cited by Plaintiff in support of its motion would not be found in the jurisprudence. The cases agree that the issue is one vested within the sound discretion of the federal district judge. As the Supreme Court noted in the *Beacon Theaters* case, the district court **may** try both legal and equitable actions in a single trial. There is no requirement, since Fed. R. Civ. P. 42(b) clearly permits this Court to exercise its discretion to do precisely the opposite.

9. As the court noted in the case of *Reliance Insurance Company v. Wilson*, 1991 A.M.C. 716 (N.D. Cal. 1990), "[t]he court has power to limit discovery to certain issues to defer costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive issues." *Id.* at 718] in granting a motion to bifurcate and stay discovery in precisely this same type of first party marine insurance declaratory judgment action. As Defendant points out, the court in Reliance allowed discovery

solely on the aspect of the counterclaim that asserted a simple breach of contract, but severed and stayed any discovery on the elements of the counterclaim that asserted the type of bad faith claim which Mr. Wimber seeks to pursue in the instant matter.

10. Explaining its action, the court stated:

> [I]n the interests of convenience and judicial efficiency, the court is exercising its discretion to hold trial first on plaintiff's underlying claim, and to try defendant's counterclaims only if the result in the initial phase of trial comes out in favor of defendant. *Id.*

11. To argue that Plaintiff failed to meet some mysterious "burden" that stands as a threshold simply ignores the wording of the applicable Federal Rule of Civil Procedure and the holdings of the cases. There is no such "burden" imposed upon the Plaintiff in the instant matter. Rather, Plaintiff is asking this Court to look the Defendant's claims squarely in the eye, recognize these for what they are, and then exercise the discretion granted under Fed. R. Civ. P. 42(b).

12. Recognizing the value of judicial economy and the preferability of resolving the underlying coverage issue separate from and in advance of the speculative and contingent bad faith claims, the majority of courts and commentators agree with the position advocated by the undersigned counsel for Plaintiff. *See, e.g., Light v. Allstate Insurance Company.*, 203 W.Va. 27, 506 S.E.2d 64 (W. Va. 1998); "Bifurcation of Breach of Contract and Bad Faith Claims in First-Party Insurance Litigation," 21 Vt. B.J.

& L. Dig. 35 (1995).

13. Only such relief can achieve the goals which have been enunciated in the caselaw:

A). Cost savings to both parties;

B). Avoidance of burdensome and complicated discovery problems with insurance claims files;

C). Avoidance of unfair prejudice to a litigant arising when contract and bad faith claims are combined;

D). avoidance of the possibility of disqualification of trial counsel because of inherent conflict of interest problems.

14. *See, e.g., Light v. Allstate Insurance Company, supra,* at 73.

15. The astounding assertion made by Defendant's counsel that any court will permit a bad faith counterclaim to proceed even where the underlying coverage issue is decided in favor of the insurance company is simply untrue. In the well known Ninth Circuit case of *Cigna Property & Casualty Insurance Co. v. Polaris Pictures Corp*, 159 F.3d 412, 1999 A.M.C. 1 (9th Cir. 1999), the court noted that "[t]he district court correctly determined as a matter of law that if Cigna prevailed on its rescission claim, Polaris's counterclaims necessarily would be defeated." 1999 A.M.C. at 9. *See also, South Hampton Refining Co. v. National Union Fire Insurance Company*, 875 F.Supp. 382 (E.D. Tex. 1995),

where a Rule 42(b) severance was granted and in which the federal district court noted that "[i]n insurance coverage suits, a plaintiff's bad faith claims generally depend on the outcome of contractual coverage claims and are usually severed. *Id.*, at 384.

16. Even more critically, the Ninth Circuit in the *Polaris* case, *supra*, noted that the trial court would be correct to conduct a completely separate bench trial on the rescission claim set forth in the marine insurance company's Complaint for Declaratory Judgment, with a jury trial on the counterclaim only at a later date and time! The Ninth Circuit stated:

> This argument assumes Polaris had the right to present its counterclaims to a jury at the same time Cigna was presenting its equitable rescission claim to the court. **This is not so**. (emphasis added). The district court had the discretion to first conduct a bench trial on the equitable rescission claim. 1999 A.M.C. at 9.

17. For all of the foregoing reasons, it should be clear to this Court that Plaintiff's motion is well premised and that the relief is more than merited by the circumstances of this particular case. In a first party marine insurance coverage litigation, where a bad faith counterclaim has been lodged by the insured, federal district courts routinely and rightly exercise their discretion under Fed. R. Civ. P. 42(b) to sever the actions and to stay discovery on the bad faith claim until there has been a resolution of the original coverage dispute. That is the relief sought by the Plaintiff,

Dated: September 23, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing pleading was served on the interested parties herein via the U.S. Postal Service addressed as follows:

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